

RECEIVED
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIE MCCRAY, 183709

Petitioner,

V.S.

CASE NO: 1:06-1107-WKW

WILLIE THOMAS, et al.,

Respondents.

TRAVERSE

Comes now the Petitioner, Willie McCray proceeding Pro-Se and through Inmate assistance and respectfully responds to the Attorney General's supplemental answer and will show unto this court as follows;

In the Attorney General's Supplemental Answer, he stated that, the Petitioner "APPEARS" to raise two claims arising from his second Jury Trial (1) that McCray's Indictment was improperly amended from capital murder to felony murder, and the capital murder Indictment was viewed by the Jury;

There is no dispute to this fact, as alleged and proven by McCray in his Petition for relief. At the Petitioner's post conviction Rule 32 Hearing, the Trial court admitted that he was the person that marked through the word INTENTIONALLY CAUSE the death of Michael Scott, and the Trial court also mark through the Alabama Code Section 13A-5-40 (a) 2 and replaced it with the hand written 6 (a) 3. Even though the record contains both the **[NON LEGALLY AMENDED INDICTMENT AND THE STATEMENT OF THE TRIAL COURT]**;

In the State of Alabama, the law is well settled on the point of an amended Indictment, and there are several current State cases that support Petitioner's position, one of which is from Houston County, Alabama ". **The amendment purporting to add this charge was void. An indictment may be amended by order of the court with the consent of the defendant in all cases, except to change the offense or to charge new offenses not contemplated by the original indictment. Ross v. State, 529 So. 2d 1074 (Ala. Crim. App. 1988) ; Ala. R. Cr. P. 13.5.** In this case, the added charge is a substantial change from the indictment returned by the grand jury and charges a new offense not included in the original charge. Thus, all proceedings stemming from the amendment of the indictment had no legal effect and were

void."Hammond, 665 So. 2d at 974 (emphasis added).

The Petitioner's case here is different from Hammonds, and several other cases, where McCray went to a Jury Trial on a Capital Murder Indictment and was found guilty by a Jury of Felony Murder, a lesser included offense, and his conviction/sentence was later reversed and remanded for a New Trial. He was later tried and convicted on the same Capital Murder Indictment, by a different Jury where the Trial Court, the District Attorney, or his appointed Counsel did not get his consent to amend the indictment, they just proceeded on to a Trial, and the Trial Court Judge took his pen and mark through portions of the Indictment, and allowed the words (**CAPITAL MURDER**) to remain on the indictment, putting the Jury on notice that he had once been indicted in this case of the offense of Capital murder.

It was also conveyed through the testimony at trial that there had been another Trial, in this Case, which caused prejudice to the Petitioner.

The Alabama Rules of Criminal Procedure Rule 13.5 and Code of Alabama 1975 15-8-90 makes it clear that the indictment can not be amended without the consent of the Defendant, {ON THE RECORD}; Here there is no where in the record that McCray or his counsel consented to the Indictment being amended SEE § 15-8-91. Consent not given to amend.

Text

If the defendant will not consent to such amendment of an indictment, the prosecution may be dismissed at any time before the jury retires as to the count in the indictment to which the variance applies, and the court may order another indictment to be preferred at a subsequent time, in which case an entry of record must be made to the effect following:

"The appellant was indicted under one Code section and sentenced under another. This was a substantial change from the indictment as returned by the grand jury and does not fall within the permissible limits of § 15-8-90, supra. See: Crews v. State, 40 Ala.App. 306, 112 So.2d 805 (1959).

REVERSED AND REMANDED."

All the Judges concur.

O. C. BESTER v. STATE

Court of Criminal Appeals of Alabama

362 So 2d 1282 362 So. 2d 1282; 1978 Ala Crim App LEXIS 1396 1978 Ala.

Crim. App. LEXIS 1396

No. 3 Div. 933

October 3, 1978

The Petitioner further alleges in his complaint that the part of the Indictment that the Trial court amended, does not state an offense; there is no where in the Code of Alabama 1975 where the Code section cites **13A-6-(a) 3.**, as it is written in the trial court Judge's hand writing, therefore, that would make the entire Indictment Void on it's

face; and if the Indictment is in fact void, the Trial court had no Jurisdiction to render judgement, or to impose the sentence that he did, therefore, this would make McCray actually innocent of the crime for which he is convicted and sentenced;

"If the first indictment was an attempt to charge first- degree perjury, it failed to charge an essential element of the offense, materiality, and was, therefore, void. Consequently, it would not toll the statutory limitations period for the return of the second indictment. "The word 'void,' in its strictest sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force." Black's Law Dictionary, 1573 (6th ed. 1990). Since a void indictment has no legal effect, there was nothing to toll the statute of limitations. Cf. State v. Fain, 484 So. 2d 558, 559 (Ala. Crim. App. 1986. Consequently, the trial court erred in denying Zimlich's motion to dismiss the perjury charge. Therefore, we reverse the judgment of the trial court and render a judgment in favor of Zimlich."

REVERSED AND JUDGMENT RENDERED.

Wayne Zimlich v. State

COURT OF CRIMINAL APPEALS OF ALABAMA

872 So 2d 881 872 So. 2d 881; 2003 Ala Crim App LEXIS 1632003 Ala. Crim.

App. LEXIS 163

CR-01-1706

June 27, 2003, Released

For this reason, the argument posed by the Attorney General's office that this is not an actual innocence claim would have to fail, and this Petitioner is entitled to review by this court;

The Attorney General also contends that the Petitioner has established his right to equitable tolling, and that the petition is time-barred;

McCray can not dispute the fact that his petition is time barred, however, as this Court is aware, as well as the Attorney General, the Court has given Appellate Attorney, Joseph W. Lewis several opportunities to submit an affidavit and a copy of the letter that he sent to McCray advising him "that his application for Rehearing had been Overruled, that the undersign Joseph W. Lewis was withdrawing as his Appellate Counsel and McCray would have (14) days from the date of the Overruling of his application for Rehearing to Petition the Supreme Court of Alabama for Certiorari review;

Attorney Lewis has yet to respond to the Court's order,. however, to aid this Court in determining whether or not Attorney Lewis notified the Petitioner as to whether his Appeal had been affirmed, and his Application for rehearing had been overruled, the Petitioner will submit a copy of the steps that he took, to find out that his Appeal/and rehearing was affirmed.

The enclosed documents, and the response from the Alabama court of Criminal

Appeals will prove that Attorney Lewis never notified this Petitioner that the Application for Rehearing had been overruled **{SEE ATTACHED EXHIBITS} (1, 2, 3, 4)**

In the instant case, Equitable tolling should be applied because, the appointed Appellate Counsel prevented McCray from filing his Petition for Writ of Certiorari in the Alabama supreme court, in accordance with the holdings of the United States Supreme Court in **O'SULLICAN V. BOERCKEL, 144 Led 2d 1 (1999)**, and Counsel knew or reasonable should have known that, he was blocking the Petitioner's rights to redress , in the Alabama supreme Court and the Federal District Court, and possibly the 11th Circuit court of Appeals.

The 11th Circuit Court of Appeals, and this Court has held that;

"In the Eleventh Circuit, equitable tolling is applicable "only upon finding an inequitable event [that] prevented plaintiff's timely action." Justice v. United States, 6 F.3d 1474, 1479 (11th Cir. 1993) (citation omitted). The Eleventh Circuit has summarized the doctrine as follows:

The interests of justice are most often aligned with the plaintiff when the defendant misleads her [or him] into allowing the statutory period to lapse (citations omitted); when she [or he] has no reasonable way of discovering the wrong perpetrated against her [or him] (citations omitted); or when she [or he] timely files a technically defective pleading and in all other respects acts with "the proper diligence . . . which . . . statutes of limitations were intended to insure." (citations omitted). The interests of justice side with the defendant when the plaintiff does not file her [or his] action in a timely fashion despite knowing or being in a position reasonably to know that the limitations period is running (citations omitted); and, of course, when she fails to act with due diligence (citations omitted). It bears emphasizing, however, that due diligence on the part of the plaintiff, though necessary, is not sufficient to prevail on the issue of equitable tolling. The Supreme Court has made clear that tolling is an extraordinary remedy which should be extended only sparingly. (citations omitted). Though his dereliction be only incidental, a generally diligent plaintiff who files late because of his own negligence typically may not invoke equity to avoid the statute of limitations. "Principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect." (citations omitted).

6 F.3d at 1479-80. Applying these principles to the present case, the court finds that equitable tolling does not apply because Petitioner provides no grounds for applying the doctrine."

TERRY WAYNE McLESTER, Petitioner, v. JOE S. HOPPER, Comm'r of the Ala. Dep't of Corrections, et al., Defendants.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION 67 F Supp 2d 130867 F. Supp. 2d 1308; 1999 US Dist LEXIS

The Petitioner also claims that his Trial counsel was ineffective at trial for various

reasons, which are set fourth more clearly below;

(a) Counsel was ineffective during Trial for his failure to Object to the Amended Indictment, when he knew or reasonably should have known that the Indictment did not charge an offense, as set out above, and further allowed the district Attorney and the trial Court to amend the Indictment without the Petitioner's consent, **"on the record"**

(b) Counsel was further ineffective when he solicited testimony from one of the State's witnesses about the first Trial, in the presence of the Jury, allowing the Jury to know that McCray had been to Trial, and convicted in this case prior to this date;
(see rt.. 251, 303 , 308, 309,332, 334,335,)

In order to prevail on an issue of Ineffective assistance of trial Counsel, a Defendant must meet the (2) prong test as set fourth in **82 LED2D 864, 467 US 1267 Strickland v Washington, [10]** **A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.**

"[2] Our decisions have emphasized that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." Strickland v Washington, supra, at 684, 80 L Ed 2d 674, 104 S Ct 2052; Nix v Whiteside, 475 US 157, 175, 89 L Ed 2d 123, 106 S Ct 988 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); United States v Cronin, 466 US 648, 653, 80 L Ed 2d 657, 104 S Ct 2039 (1984) ("Without counsel, the right to a trial itself would be of little avail") (internal quotation marks and footnote omitted); United States v Morrison, 449 See 122 LED2D 180, 506 US 364 LOCKHART v FRETWELL A. L. LOCKHART, Director, Arkansas Department of Correction, Petitioner vs. BOBBY RAY FRETWELL, 506 US 364, 122 L Ed 2d 180, 113 S Ct 838

In the instant case, but for Counsel's preformance, the outcome of the Trial might would have been different;

CONCLUSION

For the reasons stated herein, the Petitioner respectfully request that this Honorable Court will set this matter for an evidentiary hearing, or grant such other relief that this Court deems proper and just.

RESPECTFULLY SUBMITTED

Willie McCray
WILLIE McCRAY

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing on the parties listed below, by placing a copy of same in the United States Mail properly addressed and postage pre-paid this 8th Day of ~~May~~, 2007

June

STATE OF ALABAMA
OFFICE OF
ATTORNEY GENERAL
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130-0152

Willie McCray
WILLIE McCRAY # 183709
ELMORE CORR. FACILITY
P.O. BOX 8
ELMORE, AL. 36025



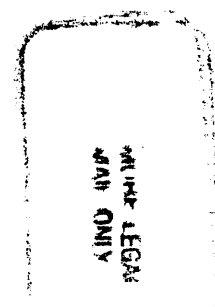
LIE MCCRAY # 183709 A-1-91

ORE CORRECTIONAL FACILITY

BOX 8

MORE, ALABAMA 36025

OFFICE OF THE CLERK,
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
PO. BOX 711
MONTGOMERY, ALABAMA 36101-0711



March 8, 2002

3/8/02
Honorable Joseph W. Lewis
Attorney At Law
Byrd & Byrd
P.O. Box 536
Dethan, Alabama 36302

Re: Willie C. McCray
Case Number: CC-94-791 CC-94-792

Dear Mr. Lewis;

This brief letter is to ask you for your assistance. At present I'm in the process of preparing for filing a "Petition For Relief From Conviction Or Sentence" pursuant to Rule 32 A.R.C.R.M.P. and I only have One (1) year from the date of the last high court's decision in my case which was decided on direct appeal by the Alabama Court Of Criminal Appeals, which was by my records, November 21, 2001. I presently do not know whether you filed a "Application For Rehearing" pursuant to Rule 40 A.R.A.P. to the Alabama Court Of Criminal Appeals, or whether you filed a "Petition For Writ Of Certiorari" to the Alabama Supreme Court, as the time for filing both of these documents have long expired.

Mr. Lewis, I need very much to file this Rule 32 Petition, so that I may stop the time from running on my "Petition For Writ Of Habeas Corpus" in the Federal District Court, as pursuant to "28 USC § 2244 (d) (1)" which states that ("A One (1) year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court, the limitations period shall run from the latest of (2) The time during which a properly filed application for State Post Conviction or other collateral review with respect to the pertinent judgement or claim is pending shall not be counted toward any period of limitations under this subsection.")

It is very clear, that I must file my Post Conviction Petition, within One (1) year, to be able to file a Petition For Writ Of Habeas Corpus in the Federal District Court, raising the claims that you raised on direct appeal, as well as any claims that I may have in the State court under the provisions of Rule 32 A.R.CRIM.P.

The drift of this letter is to ask you to please forward to me copies of the following documents, which these documents are needed in order for me to properly file my Post Conviction Petition.

1. Trial Transcript (Copy)
2. Appellant's Brief (Copy)
3. Appellee's Brief (Copy)
4. Appellants Reply Brief (Copy)
5. Alabama Court Of Criminal Appeals Decision (Direct Appeal) (Copy)
6. Application For Rehearing/Brief, (if applicable) (Copy)
7. Petition For Writ Of Certiorari/Brief (if applicable) (Copy)

I'm asking that you please, at your earliest possible convience, forward the above referenced documents to me, your cooperation in this matter would be so greatly appreciated in advance.

Sincerely Yours

Willie C. McCray
Willie C. McCray
AIS# 183709
William E. Donaldson Correctional Facility
100 Warrior Lane
Bessemer, Alabama 35023-7299

March 28, 2002

Alabama State Bar
Disciplinary Commission
Post Office Box 671
Montgomery, Alabama 36101

Re: Complaint

Sub: Honorable Joseph W. Lewis
Attorney At Law
Byrd & Byrd
P.O. Box 536
Dothan, Alabama 36302

Dear Commission Board:

This brief letter is to bring to your attention that I wrote to the above attorney several times, requesting my trial transcripts, briefs and etc, and this attorney refuses to write to me, I am in need of all of my legal documents, in order to prepare litigation past the Alabama Supreme Court, because once he files the last document in the Alabama Supreme Court, he will no longer litigate my case any further.

I have attached the last letter that I wrote to him asking him to please forward to me all documents in my case filed by him, but he has not complied with my request, therefore I have no other choice but to try to have your office to order him to forward to me the copies I have asked for over and over again but to no avail.

Please let me know why this attorney will not forward to me the requested documents, as he has no other use for same, after he files the last document he intends to file, I will be awaiting your reply to this letter with hopes that this attorney will forward all documents to me at his earliest possible convenience.

Sincerely Yours

Willie C. McCray
Willie C. McCray
AIS# 183709
William E. Donaldson Correctional Facility
100 Warrior Lane
Bessemer, Alabama 35023-7209

CC: File

April 15, 2002

Alabama State Bar
Disciplinary Commission
Post Office Box 671
Montgomery, Alabama 36101

Re: Complaint

Sub: Honorable Joseph W. Lewis
Attorney At Law
Byrd & Byrd
P.O. Box 536
Dothan, Alabama 36302

Dear Commission Board;

This brief letter once again is to let you know that on March 28, 2002 I wrote to your office with a complaint on attorney Lewis, for his failure to forward my criminal documents to me. On April 9, 2002 your office wrote to me and informed me that you had wrote to attorney Lewis and asked him to forward the requested documents to me.

Attorney Lewis did in fact forward some documents to me, but he sent me a copy of the Total Transcript only, there were no other documents sent to me as I had requested earlier.

I'm asking that you please inform attorney Lewis that I would like to have all appellate briefs filed in my case, as well as any other appellate documents filed by him, and the appellee.

I need these documents in order to have access to the courts for a claim that I am proceeding forward on, please let me know if this attorney will in fact forward the rest of the documents to me it is very important that I receive these documents.

Sincerely Yours

Willie C. McCray
Willie C. McCray
AIS# 183709
William E. Donaldson Correctional Facility
100 Warrior Lane
Bessemer, Alabama 35023-7299

CC: File

May 12, 2002

Honorable Lane W. Mann
Clerk
Court Of Criminal Appeals
State Of Alabama
Judicial Building
300 Dexter Avenue
P.O. Box 301555
Montgomery, Alabama 36130-1555

Re: Case Number: CR-0000241

Dear Mr. Mann;

I'm writing this letter to inquire into whether my attorney the honorable Joseph W. Lewis esq filed for a "Application For Rehearing" pursuant to Rule 30 A.R.A.P. In the above styled case, On November 21, 2001 this court entered a memorandum wherein it affirmed the appellants conviction and sentence for his conviction of "Felony Murder" this was the second appeal taken by the appellant, on August 28, 1998 this honorable court reversed the appellant conviction in McGray V. State 738 so 2d 911 (Ala. Crim. App. 1998).

I have wrote attorney Lewis several letters asking whether he filed any further appeals in this case, including the Alabama State Bar, Mr. Lewis has to date, failed to inform me whether he has filed any further appeals in this case.

I'm asking for the record, would you please inform me, whether or not attorney Lewis has filed a Application For Rehearing in your court in the above referenced case, timely, or untimely.

Your most prompt attention to this matter would be greatly appreciated

Sincerely Yours

Willie C. McCray
Willie C. McCray
AIS# 183709 B-101
William E. Donaldson Correctional Facility
100 Warrior Lane
Bessemer, Alabama 35023-7299

CC: File

5/28/02

May 28, 2002

Honorable Robert G. Esdale, Sr.
Clerk
Supreme Court Of Alabama
300 Dexter Avenue
Montgomery, Alabama 36104-3741

Re: Case Number: CR-00-0241

Dear Mr. Esdale;

I'm writing this letter to inquire into whether my attorney the honorable Joseph W. Lewis esq filed for a "Petition For Writ Of Certiorari" pursuant to Rule 39 A.R.A.P. In the above styled case.

Sir, on November 21, 2001 the Alabama Court Of Criminal Appeals entered a Memorandum wherein it affirmed the appellants conviction and sentence for his conviction of "Felony Murder" this was the second appeal taken by the appellant.

On August 28, 1998 the Alabama Court Of Criminal Appeals reversed the appellants conviction in McCray V. State; 738 so 2d 911 (Ala. Crim. App. 1998)

I have wrote to attorney Lewis several letters of inquire, asking whether he filed any further appeals in this case, including the Alabama State Bar Mr. Lewis has to date, failed to inform me whether he has filed any further appeals in this case.

I'm asking for the record, would you please inform me, whether or not attorney Lewis has filed a "Petition For Writ Of Certiorari" in your court in the above referenced case, timely, or untimely, or not all.

Your most prompt attention to this matter would be so greatly appreciated

Sincerely Yours

Willie C. McCray
Willie C. McCray
AIS# 183709 B-101
William E. Donaldson Correctional Facility
100 Warrior Lane
Bessemer, Alabama 35023-7299

CC: File

June 24, 2002

Honorable Robert G. Esdale, Sr.
Clerk
Supreme Court Of Alabama
300 Dexter Avenue
Montgomery, Alabama 36104-3740

Re: Case Number: CR-00-0241

Dear Mr. Esdale;

I'm writing this letter once again. In a follow up letter to the letter I wrote to you on May 28, 2002, in which I have not yet received any reply I'm, inquiring into whether my attorney the honorable Joseph W. Lewis esq filed a "Petition For Writ Of Certiorari" pursuant to Rule 39 A.R.A.P. In the above styled case.

Sir, on November 21, 2001 the Alabama Court Of Criminal Appeals entered a Memorandum wherein it affirmed the petitioner's conviction and sentence for his conviction of "Felony Murder" this was the second appeal taken by the appellant.

I have wrote several letters to attorney Lewis asking whether he filed any further appeals in my case, including the Alabama State Bar Mr. Lewis has to date, failed to inform me whether he has filed any further appeals in my case

I'm asking once again for the record, will you please inform me, whether or not attorney Lewis has filed a Petition For Writ Of Certiorari in your court in the above styled case. timely or untimely

Sincerely Yours

William E. McCray
William E. McCray

AIS# 183709 B-101
William E. Donaldson Correctional Facility
100 Warrior Lane
Bessemer, Alabama 35023-7299

CC: File

1 dropped. I don't object to that.

2 THE COURT: Is that it?

3 MR. CAPPS: Right.

4 MR. VALESKA: I won't object to that.

5 THE COURT: Okay.

* 6 (At which time the following proceedings
7 were held in open court:)

8 Q Once again, Mr. Clark, maybe I didn't phrase the
9 question quite properly. But were you promised to
10 have any cases dismissed or dropped to get you to
11 come down here and testify?

12 A No, sir.

13 Q When you became a witness in this case, you were
14 interviewed by the Dothan Police Department; is
15 that correct?

16 A Yes, sir.

17 Q Where did they locate you to talk with you about
18 the case?

19 A Originally?

20 Q No. After the case was going on. Of course,
21 originally it was at the Country Market. I'm
22 talking after that.

* 23 A I was living in Tallahassee when the first trial
24 was to be -- you know, do the first trial.

25 Q You were living in Tallahassee?

1 decide to answer a question now without a lawyer
2 present, you still have the right to stop
3 answering questions at any time. And you also
4 have the right to stop answering questions at any
5 time to talk to a lawyer. The waiver of the
6 rights I've read this statement of my rights and I
7 understand what my rights are and I am willing to
8 make a statement and answer questions. I do not
9 want a lawyer at this time. I understand and know
10 what I'm doing. No promises or threats have been
11 made to me. And no pressure of any kind has been
12 used against me to get me to make this statement.

13 Q Now, did Willie C. McCray sign that?

14 A Yes, sir.

15 Q What was the date and time?

16 A He signed it at eleven-thirty on 8-13 of '93.

17 Q Did you sign it?

18 A Yes, I did.

19 Q ~~Who else was present in the room when the waiver~~
20 ~~was done?~~

21 A ~~None.~~

22 Q Now, did he agree to talk with you?

23 A Yes, he did.

24 Q Now, Lieutenant Devane, can you tell the ladies
25 and gentlemen of the jury, did he appear to be

1 state for the Record that the Defendant at no time
2 ~~was fully informed of the~~ rights he had -- he had
3 the right for an attorney to be present with him
4 at this time. Although that says that on the
5 statement, the waiver form, Lieutenant Devane was
6 in the state of Florida and had no means of
7 providing the defendant with an attorney. He's
8 already testified that he was the only one in the
9 room with the defendant and there was no other
10 person there. He was outside the state of
11 Alabama, outside the jurisdiction of this district
12 attorney's office and the state of Alabama and had
13 no authority with which to provide this defendant
14 an attorney. There's already been testimony I
15 believe that there was an attorney present at a
16 lineup that did represent Mr. McCray through the
17 public defender's office down there in the state
18 of Florida. It's obvious to me that that office
19 from the testimony we heard had a policy of
20 providing defendants attorneys in that state when
21 they were made aware that a defendant would be
22 possibly questioned and/or put in a lineup. This
23 was not the case. He was not given the right to
24 an attorney. He was in the state of Florida, not
25 in the state of Alabama, and as such we'd ask the

1 Court to exclude that statement.

2 THE COURT: Mr. Valeska?

3 STANLEY DEVANE

4 having previously been sworn, was examined and
5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. VALESKA:

8 Q ~~If I could, Lieutenant Devane, when you went over~~
9 ~~his rights, did you offer him a chance for~~
10 ~~attorney?~~

11 A ~~Yes.~~

12 Q The physical lineup had already been done or had
13 it not been done?

14 A It had not been done at this time.

15 Q Tell Judge White, if he wanted a lawyer before he
16 would have talked to you, would you have obtained
17 a lawyer there for him?

18 A Yes, sir.

19 Q At any time did he tell you he didn't want to talk
20 with you?

21 A No, sir.

22 Q At any time did he tell you he wanted to stop?

23 A No, sir.

24 Q So he signed the consent and agreed to talk with
25 you without having counsel; is that correct?

1 were held in open court:)

2 MELANIE MCDUGLE

3 having first been duly sworn, was examined and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. VALESKA:

7 Q Just for the Record, you've been put under oath,
8 correct, ma'am?

9 A Yes, sir.

10 Q Tell me your name, please, ma'am.

11 A Melanie McDougale.

12 Q ~~Ms. McDougale, if I could, previously, before~~
13 ~~coming in court today, years ago, did you have an~~
14 ~~opportunity to be employed?~~

15 A ~~Yes, I was.~~

16 Q Were you employed in the media in any manner or
17 fashion?

18 A Yes, I was.

19 Q Who did you work for?

20 A WKMX.

21 Q ~~Now, did you have the occasion to be present while~~
22 ~~prior testimony was given under oath in this very~~
23 ~~courtroom while the State of Alabama, I~~
24 ~~represented, Willie C. McCray was present with his~~
25 ~~attorneys Jennifer Atwell and a Matt Lamere?~~

1 Q In the presence of Willie McCray and his two
2 lawyers, ma'am, do you recall what question I was
3 asking Jeff Clark or what he said in Willie
4 McCray's hearing or presence testimony under oath
5 in this courtroom?

6 A ~~Yes, sir. You had asked what the defendant was~~
7 ~~wearing.~~

8 Q And was there a response by Willie C. McCray at
9 the counsel table with his two lawyers that you
10 overheard in a public courtroom as to what he said
11 in response to that, if anything?

12 A Yes, sir. He said, I wasn't wearing no shorts.

13 Q And would you tell the ladies and gentlemen of the
14 jury as being a reporter for KMX, were you also
15 writing down what was being said in the courtroom?

16 A Yes, sir, I was.

17 Q Did you write down his response?

18 A Yes, sir, I did.

19 Q ~~Was that brought to Mr. Lamere's and Ms. Atwell's~~
20 ~~and Willie C. McCray's attention as to what you~~
21 ~~had overheard him say publicly?~~

22 A ~~Yes, sir.~~

23 Q ~~Do you see Willie C. McCray at the table?~~

24 A ~~Yes, sir.~~

25 Q Is that the man who said what you've indicated

1 that he wasn't wearing no shorts?

2 A Yes, sir.

3 MR. VALESKA: That's all I have. I pass the
4 witness, Your Honor.

5 CROSS EXAMINATION

6 BY MR. CAPPS:

7 Q Ms. McDougle, you did not hear anything other than
8 that one statement; is that correct?

9 A No, sir.

10 THE COURT: You mean that the Defendant said?

11 MR. CAPPS: Yes. I'm sorry. That's what we
12 were talking about.

13 Q Is that correct?

14 A I'm sorry. I don't understand the question.

15 Q Before that statement was made, did you hear the
16 Defendant say anything?

17 A Yes, sir.

18 Q After the statement was made, did you hear him say
19 anything?

20 A No, sir.

21 Q ~~Did you testify in a previous trial?~~

22 A ~~Yes, sir.~~

23 Q And once again, immediately before -- let me
24 qualify. Immediately before the statement was
25 made that you allege here today, did you hear the